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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

In re Robert V. Steinhilber,

Petitioner,

v.

The Honorable D. Brook Bartlett,
United States District Judge,
Western District of Missouri,
Western Division

---

From The United States Court Of Appeals
For The Eighth Circuit

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# PETITION FOR A WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, AN ALTERNATIVE WRIT OF MANDAMUS

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Robert V. Steinhilber,
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9209 N.W. 9th Place
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153 pp

## QUESTIONS PRESENTED

I. Where a party has filed a Motion and Affidavit seeking the disqualification of a federal district court judge under 28 U.S.C. § 455(a), alleging the judge could not preside impartially, and the judge has refused to disqualify himself, whether it is appropriate at that time to file a petition for mandamus in the circuit court of appeals seeking to compel disqualification, or whether it is necessary to wait until appeal for resolution of this issue.

II. Whether under 28 U.S.C. § 455(a), a Motion and supporting affidavits such as filed by Petitioner is sufficient to cause a federal district court judge to be disqualified.

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## OPINIONS BELOW

The only opinion below was set forth in Respondent's Order denying Petitioner's Motion for disqualification, wherein he stated:

> "After reviewing Steinhilber's Affidavit and Suggestions In Support of Motion, no reasonable person would conclude that my impartiality in this case might reasonably be questioned."

The Eighth Circuit Court of Appeals made no statement in either its Order denying the Writ Of Mandamus or the rehearing.

## JURISDICTION

On November 9, 1992, the United States Court of Appeals For The Eighth Circuit denied Petitioner's "Petition For Rehearing By Panel" of his "Petition For Writ Of Mandamus" which had been denied on Oc-

tober 1, 1992. Petitioner had petitioned the Court to direct Respondent to disqualify himself from presiding in the matter of Michael S. McFarland, et al. v. Winnebago South, Inc. et al., now before him. Petitioner is a defendant in that case, and had made a Motion with supporting affidavits requesting Respondent to disqualify himself under 28 U.S.C. § 455 (a). Respondent issued an Order denying Petitioner's Motion.

The Supreme Court's jurisdiction to issue writs of mandamus emanates from the so-called "all-writs" section, 28 U.S.C. § 1651(a); section 455(a), 28 U.S.C. provides for federal district court judges, among others, to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned.

**STATUTES INVOLVED**

Section 1651(a), 28 United States Code,

states:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Section 455(a), 28 United States Code, states:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

## STATEMENT OF THE CASE

Petitioner is a stockholder and creditor, and former President and Chairman of the Board of Directors of Winnebago South, Inc., a Missouri Corporation, currently in receivership in United States District Court For The Western District of Missou-

ri, Western Division (McFarland et al. v. Winnebago South, Inc. et al., No. 19967-CV-W-9), as the result of a class action lawsuit by 14 lot purchasers (out of a total of approximately 325) at said Corporation's Lake Winnebago Retirement Village subdivision (Winnebago South), Lake Winnebago, Cass County, Missouri. The lawsuit was filed on December 23, 1971 by the law firm of Watson, Ess, Marshall & Enggas, with Paul R. Lamoree, Esq., being the primary attorney/partner involved. It continues to be maintained by said firm and said attorney. Respondent has been the presiding judge in the case since he succeeded Judge John W. Oliver, who died in 1991. The case had been transferred to Judge Oliver from Judge Elmo B. Hunter, the initial presiding judge, in 1982.

Petitioner and his wife, Johnita F. Steinhilber, were among the 19 defendants named in the lawsuit with the allega-

tions against them being "false representations", "fraudulent intent", and "wanton disregard of.....obligations", among other things.

Petitioner's wife is holder of a note in amount of $820,000.00, and deed of trust securing same, from Winnebago South, Inc. as the result of its purchase from her of the land upon which it was developing its said subdivision; she was not otherwise connected with said Corporation or said development. Respondent has named Petitioner as a beneficial claimant under said note and deed of trust.

The lawsuit was completely without merit, and according to statements by Attorney Lamoree, was brought for the purpose of giving Counsel experience in the then popular "class action" field of law.

In 1971, Winnebago South, Inc., was undergoing difficult financial times as a result of circumstances beyond its con-

trol, namely: a two-year long construction industry labor strike in the Greater Kansas City Area during both 1969 and 1970; Federal Reserve anti-inflation credit controls which were applied during approximately the same period of time; the death of one of the major principals in a closely related land development project (Winnebago North) which resulted in legal disputes among the heirs; and substantial physical and legal harassment by some property owners in the Winnebago North land development who objected to the Winnebago South land development because of their racial and economic prejudices ---- they had vowed to stop it.

The class action lawsuit developed as a result of two (2) lot owners becoming disgruntled because they felt they had paid more for <u>their</u> lots than <u>some other</u> lot owners. Through their attorneys, they demanded all their money back, and, when

this was refused, they, through their attorneys, threatened and eventually filed the class action lawsuit even though they were advised by Petitioner, as Chief Executive Officer of Winnebago South, Inc., of the troubles being experienced (as aforestated), and that such action might "do (their) clients great harm, and hurt other innocent people as well." The lawsuit was filed while Petitioner was in the hospital recovering from a severe heart attack which necessitated his move to Florida. The advice was prophetic. The Receiver has, for all practical purposes, abandoned the project, and it has become derelict.

On June 26, 1973, the initial Receiver (whose son succeeded him upon his death), filed a motion for an order cancelling said note and deed of trust, with suggestions in support. On June 29, 1973, Judge Hunter issued an Order calling for a <u>full</u>

plenary hearing on the motion to be held on July 16, 1973 at 10:00 a.m. The following entry was made in the court's docket sheet opposite June 29, 1973 date:

> "ORDER for written responses to receiver's motion for plenary order cancelling 2nd deed of trust* & setting he(a)ring thereon(.), filed, mailed. (Each party to respond to the motion on or before Jul. 13, 1973. ORDERED that a full plenary hearing with respect to the motion, and to such responses to it as may have been filed is set for July 16, 1973, at 10:00 a.m.)" (Emphasis added.)

* (Note: When Petitioner's wife conveyed said land to said Corporation, she allowed the Corporation to borrow money on the land from Grandview Bank and give it a first deed of trust so the corporation could secure additional monies to help in

the financing of the subdivision development; she received no cash for the conveyance, merely a note and a second deed of trust. Thus, the reference in the docket sheet to the "2nd deed of trust", it being that held by Petitioner's wife.)

**Petitioner and his wife received copies of those Orders.**

The following entry was made in the Court's docket sheets opposite July 16, 1973 date:

> "Prehearing conference. Hearing on receiver's motion for plenary order cancelling 2nd deed of trust. It is suggested by the Court that the receiver should file a plenary suit and join all parties who claim anything in the note, seek cancellation of it on the grounds on which the receiver claims it is invalid. For good cause appearing, and in

order to permit agreement to be reached for the refinancing of the Grandview Bank's note & security interest, it is hereby ORDERED that this cause be continued until further order of Court, and that the hearing upon the receiver's motion for plenary order cancelling the 2nd deed of trust which was set for hearing this morning, be postponed & subject to being reset on notice to all of the interested parties. Conference concluded." (Emphasis added.)

**Petitioner and his wife received copies of that Order.**

No action was taken in regard to the proposed cancelling of the subject note and deed of trust for more than eighteen (18) years.

During that time, on June 30, 1983,

the following entry was made in the docket sheets:

6/30/83: "JS-6 - card completed."

The JS-6 Card showed the case to have been "Dismissed, discontinued, settled, withdrawn, etc.", with a "Termination" date of "06 30 83", and the term "CLOSING" on the Card.

Yet, on September 12, 1991, Respondent ignored the JS- 6 Card dismissal and issued an Order "requiring receiver to provide status report" and "to attend the 10/1/91, hrg & provide a status report on this litigation". (Emphasis added.) **Neither Petitioner nor his wife received copies of or any information about the Order, or any October 1, 1991 hearing, although they both separately kept the court informed of their addresses at all times.**

Previously, **in a case where Petitioner was plaintiff** alleging abuse of process **against the court appointed Trustee for**

**Winnebago North development company and the court appointed attorney for the Trustee,** Respondent, after considering the case for more than sixteen (16) months, declared the case had been "dismissed in June, 1980" by reason of the following entry in the court's docket sheets:

6/30/80: "JS-6 CARD - Completed."

The JS-6 Card showed the case to have been "Dismissed for want of prosecution", with a "Termination" date of "06 30 80", the term "CLOSING" on the Card, and the notation: "Pending over 3 years" and "No action for over 13 months." This Mc-Farland v. Winnebago South, Inc., et al case had been pending for over eleven and one-half (11½) years, and there had been no action for over seventeen (17) months. In fact, since August 17, 1981, (more than twenty-one (21) months), there had been no action other than the case being trans-

ferred from Judge Hunter to Judge Oliver (on January 21, 1982).

In addition to the fact that that case was dismissed, Respondent's ruling (in 1991) that the case had been dismissed on June 30, 1980 protected the court appointed Trustee and his attorney from the malicious prosecution action Petitioner intended to bring against them as soon as their case against Petitioner was terminated, because by 1991 the statute of limitations had run. (Termination of the case was a necessary element in his malicious prosecution cause.) The fact that the malicious prosecution action would have been meritorious has been verified by admissions of the intended defendants subsequent to the dismissal. The ruling also precluded the filing of a like action by Petitioner's wife, inasmuch as she had also been named as a defendant in the subject action by the Trustee and his at-

torney.

**In addition to ignoring the JS-6 Card dismissal, Respondent also ignored the existing June 29, 1973 and July 16, 1973 orders of Judge Hunter.**

On September 26, 1991, Respondent cancelled the October 1, 1991 hearing, and issued a new order requiring the Receiver to provide the court "with a written report concerning the status of this litigation." **Neither Petitioner nor his wife received copies of or any information about the cancellation of the hearing or the new order, or about any resulting report of the Receiver.** Throughout the proceedings in this case, it is unknown to Petitioner or his wife just what ex parte communications and proceedings the court has engaged in, and with whom. Subsequent to the September 26, 1991 Order, the following entries were made on the court's docket sheet:

11/27/91: "ORDER - that a conference concerning the status of this case & the matters discussed in plas' class counsel's 10/25/91, letter to me will be held at 9:00 a.m. on 2/21/92, in Rm 654, U. S. Cths, 811 Grand Ave., KCMO (DBB) dist made." (Emphasis added.)

**Neither Petitioner nor his wife received any order or information about it or any proposed conference, or any October 25, 1991 letter from plaintiff's counsel to Respondent.**

The next entry in the docket sheets:

2/20/92: "MEMORANDUM - re status action & proposed order to show cause why a certain note & deed of trust should not be cancelled, to permit consideration of global settlement of action - plas." (Emphasis added.)

**Neither Petitioner nor his wife were initially sent copies of the "Memorandum".** After Petitioner learned of the "Memorandum, it took four requests before he finally received a copy, and this only after insisting a copy be "faxed" to him immediately. It is noted that the "Memorandum" was submitted by Mr. Lamoree, as attorney for the Receiver. There is no indication in the docket sheets that any conference took place on February 21, 1992, as ordered, or that it was cancelled.

**On March 23, 1992, Petitioner filed a Motion for disqualification of Respondent, with supporting Affidavit and Suggestions In Support.** Prior to doing so, he took into consideration the other disquieting things which had occurred during his relationship with Respondent. (See Motion, Exhibit A, page 1a; Affidavit In

Support, Exhibit B, page 3a; and Supplemental Affidavit, Exhibit C, page 23a.)

On June 8, 1992, Respondent issued his "Order To Show Cause Why Claim Should Not Be Disallowed And Note And Deed Of Trust Should Not Be Cancelled".

On September 9, 1992, Respondent issued his Order denying Petitioner's Motion For Disqualification. (See Exhibit D, page 32a.)

On September 21, 1992, Petitioner filed his "Petition For Writ Of Mandamus" in The Eighth Circuit Court Of Appeals. (See Exhibit E, page 34a.)

On October 1, 1992, that Court denied the Petition. (See Exhibit F, Page 51a.)

On October 12, Petitioner filed his "Petition For Rehearing By Panel". (See Exhibit G, page 52a.)

On November 9, 1992, the Court denied the "Petition". (See Exhibit H, page 57a.)

Whereupon, Petitioner files this Peti-

tion For Writ Of Mandamus, Or In The Alternative, An Alternative Writ Of Mandamus with this Honorable Supreme Court Of The United States.

## REASONS FOR GRANTING THE WRIT

**I. In regard to the first question presented: Irreconcilable conflict among the various Courts of Appeal as to whether, when a district court judge refuses to disqualify himself under 28 U.S.C. § 455(a) for alleged bias and prejudice, it is appropriate to file a petition for mandamus in the circuit court of appeals at that time, or whether it is necessary to wait until appeal for resolution of this issue.**

Petitioner can not determine from the Order of The Eighth Circuit Court Of Appeals if his Petition For A Writ Of Mandamus was denied because the Court felt it was not appropriate at that time to

file a petition for mandamus seeking to compel disqualification of a district court judge or whether it is necessary to wait until appeal for resolution of that issue; whether Petitioner's cause lacked merit in that special circumstances did not exist warranting the issuance of a writ of mandamus or whether is it necessary to have special circumstances; whether mandamus is available at all to compel the disqualification of a federal district judge; or whatever. The orders and opinions of The Eighth Circuit Court Of Appeals, as well as the other circuit courts of appeal, are not clear on these and other possible important points, and in addition, the various circuit courts of appeal differ in their opinions and treatment of the pertinent situations.

The dissertation in 56 ALR Fed 494, entitled "Mandamus As Remedy To Compel Disqualification Of Federal Judge" sup-

ports Petitioner's contentions above. It would serve no useful purpose for Petitioner to reword that treatise, and it would quite possibly result in less clarity for the Court if he were to do so. Therefore, it is reprinted in its entirety in the Appendix as Exhibit I, page 58a. **Petitioner asks the Court to please give it careful consideration.**

**II. As to the second question presented: Whether under 28 U.S.C. § 455(a), a Motion and supporting affidavits such as filed by Petitioner is sufficient to cause a federal district court judge to be disqualified.**

In Liljeberg v. Health Services Acquisition Corp., (1988) 486 US 847, 100 L Ed 2d 855, 108 S Ct 2194, this Court made a strong statement that the appearance of impartiality must be maintained to preserve public confidence in the judiciary.

Albeit in a dissenting opinion, Chief Justice Rehnquist stated:

> "As detailed in the Court's opinion, §455(a) provides that '[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.' Section 455 was substantially revised by Congress in 1974 to conform with the recently adopted Canon 3C of the American Bar Association's Code of Judicial Conduct (1974). Previously, a federal judge was required to recuse himself when he had a substantial interest in the proceedings, or 'in his opinion' it was improper for him to hear the case. Subsection (a) was drafted to replace the subjective standard of the old disqualification statute with an objective test. Congress hoped that this objective standard would promote public confidence in the impartiality of the judicial process by instructing a judge, when confronted with circumstances in which his impartiality could reasonably be doubted, to disqualify himself and allow another judge to preside over the case. The amended statute also had the effect of removing the so-called 'duty to sit,' which had become an accepted gloss on the existing statute."

The plain language of the new § 455(a), and Congress' intent as succinctly set

forth by Chief Justice Rehnquist, should be adhered to if that intent is to be realized, and not thwarted. The plain language does not reasonably accommodate such interpretations as the concept that only extrajudicial matters should be considered in determining whether a judge's "impartiality might reasonably be questioned". The plain language and the intent of the new § 455(a) make no such exclusions, and to make such an interpretation is to read into that new statute something which is not there or supported by the intent of the Congress. Especially important to the public's confidence in the judiciary is that the plain language, that which they are familiar with and understand, is honored, and not thwarted by exceptions based upon so-called "legal interpretations", which, in effect, avoid the plain language and intent of a new law, and reconcile a "business as usual"

application.

**Petitioner believes that the Respondent, in the first place, and The United States Court Of Appeals For The Eighth Circuit, secondarily, have taken a "business as usual" approach.**

Petitioner further believes that in view of the cumulative facts and record in his case, he would have to be very insensitive to not question Respondent's impartiality; that he is not being "super sensitive"; and that it is reasonable to believe that an average litigant, under like circumstances, would feel the same. In addition, Petitioner believes that in view of the fact there no longer is a 'duty to sit', that Respondent has only had the case a comparatively very short period of time, during which no rulings have been made that could not be reasonably accommodated by a new judge, an average reasonable litigant under like circum-

stances would question why Respondent is so intent upon staying on the case.

**III. The Issues Are Of Exceptional Importance To The Promotion Of The Public's Confidence In The Impartiality Of The Judicial Process, Especially At The Present Time.**

Petitioner's only recourse to avert the very real possibility that Respondent will do irreparable harm to him and to his wife by issuing orders the results of which cannot be rectified, is to this Honorable Court. **In addition, Petitioner suggests public confidence in our judicial system is so important that it would be best to err on the side of granting at least an Alternative Writ of Mandamus requiring Respondent to show cause why he should not be directed to disqualify himself, if not a Writ of Mandamus requiring him to do so.** Surely the same high degree

of sensitivity as to the inherent rights of litigants under our system of justice, and as to even the mere appearance of partiality, as this Court has shown in its orders to low level administrative law tribunals (e.g., state unemployment compensation tribunals) in such cases as Goldberg v.Kelly, 397 U.S. 254 (1970), and California Human Resources v. Java, 402 U.S. 121 (1971), should be applied in the case of our federal district courts. The strong statement of this Court in the Liljeberg case, supra, that the appearance of impartiality should be preserved, even at the expense of efficiency and finality, if necessary, is consistent with those orders to those lower level administrative tribunals.

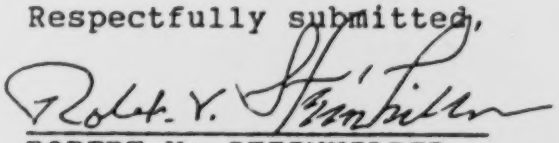
Finally, Petitioner suggests that because of the comparatively recent departures of several members of the Court, and the fact that several comparatively

new members taken their place, it would be most appropriate and timely for the currently constituted Court to make a new statement on such an important subject.

## CONCLUSION

For the reasons stated above, Petitioner asks the Court to issue a Writ of Mandamus, directing Respondent be disqualified from further presiding in the subject case, and directing the assignment of a new fair and impartial judge to preside in his stead; or in the alternative, to issue an Alternative Writ Of Mandamus, requiring Respondent to show cause why a Writ Of Mandamus, as requested, should not be issued.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| MICHAEL S. McFARLAND, et al., Plaintiffs, | ) | Civil Action |
| -vs- | ) | |
| WINNEBAGO SOUTH, INC., et al., Defendants. | ) | No. 19967-W-B-9 |

**DEFENDANT ROBERT V. STEINHILBER'S MOTION FOR DISQUALIFICATION OF HONORABLE D. BROOK BARTLETT AS PRESIDING JUDGE IN THE ABOVE-ENTITLED MATTER AND FOR THE ASSIGNMENT OF ANOTHER JUDGE TO PRESIDE IN HIS STEAD**

COMES NOW, Defendant ROBERT V. STEINHILBER, and shows that the Honorable D. Brook Bartlett is disqualified from presiding as Judge in the above-entitled matter under the provisions of Title 28, United States Code, Section 455 (a), due to the fact his impartiality is being reasonably questioned by this Defendant in

his Affidavit and Suggestions In Support Of Motion attached hereto and made a part hereof.

WHEREFORE, said Defendant moves that the Honorable D. Brook Bartlett declare himself disqualified to sit on the hearing of this cause and that another judge be assigned in his stead.

Respectfully submitted,

/s/ ROBERT V. STEINHILBER
Pro Se
9209 N.W. 9th Place
Plantation, FL 33324
305/475-0430

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "DEFENDANT ROBERT V. STEINHILBER'S MOTION FOR DISQUALIFICATION OF HONORABLE D. BROOK BARTLETT AS PRESIDING JUDGE IN THE ABOVE-ENTITLED MATTER AND FOR THE ASSIGNMENT OF ANOTHER JUDGE TO PRESIDE IN HIS STEAD" was duly mailed U. S. Postal Service, postpaid, this 18th day of March, 1992, to: Elvin S. Douglas, Jr., Esq., P.O. Box 280, Harrisonville, MO 64701, Paul R. Lamoree, Esq., 1500 Home Savings Building, 1006 Grand Avenue, Kansas City, MO 64106, and Robert L.,Jackson, Jr., Esq., 310 Ward Parkway, Kansas City, MO 64112.

/s/ ROBERT V. STEINHILBER

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| MICHAEL S. McFARLAND, et al., Plaintiffs, | ) | Civil Action |
| -vs- | ) | No. 19967-W-B-9 |
| WINNEBAGO SOUTH, INC., et al., Defendants. | ) | |

**DEFENDANT ROBERT V. STEINHILBER'S AFFIDAVIT IN SUPPORT OF HIS MOTION FOR DISQUALIFICATION OF HONORABLE D. BROOK BARTLETT AS PRESIDING JUDGE IN THE ABOVE-ENTITLED MATTER**

State of Florida )
) SS.
County of Broward )

I, ROBERT V. STEINHILBER, being duly sworn, say:

1. I am the Defendant Robert V. Steinhilber in the above-entitled matter.

2. I have only recently been advised that The Honorable D. Brook Bartlett

has become the presiding judge in said matter (by a copy of an Order dated March 4, 1992 signed by Judge Bartlett which the Court mailed to me).

3. I truly believe that Judge Bartlett cannot preside impartially in the above-entitled case.

4. The facts which cause me to believe this are as follows:

a. On April 20, 1990, I filed an abuse of process action against DALE M. THOMPSON, WHITNEY E. KERR, ABRAHAM E. MARGOLIN, F. P. KIRWAN, NORMAN M. ARNELL and the law firm of MARGOLIN & KIRWAN in the United States District Court For The Western District Of Missouri, Western Division, and was assigned Number 90-0377-CV-W-5. I drew the Honorable Scott O. Wright as the Judge to preside in the matter.

b. Defendant Thompson was the Court appointed Trustee in the LAKE WINNEBAGO DEVELOPMENT CO., INC. reorganization/bankruptcy proceedings in said Western Division, case No 41572; Defendant Kerr was Court appointed successor Trustee to Defendant Thompson; Defendant Margolin was Court appointed attorney for both said trustees; and the other defendants had served as special attorneys for said trustees upon occasion.

c. My abuse of process action resulted from a 1973 lawsuit filed and continued for more than seventeen years by said defendants, as trustees and attorneys for said development company, against me and my wife and others, in said Western

Division, case No. 73-CV-99-W-4.

d. Subsequent to accomplishing service on the Defendants under authority of Judge Wright's appointment orders dated April 20, 1990, the law firm of BLACKWELL SANDERS MATHENY WEARY & LOMBARDI made an appearance as attorneys for said Defendants (May 14, 1990).

e. On May 16, 1990, Judge Wright issued an Order extending the time within which defendants were required to answer my Complaint.

f. On June 18, 1990, Judge Wright issued an Order further extending the time.

g. On July 9, 1990, Judge Wright issued an Order that a proposed scheduling order be filed by July 31, 1990.

h. On July 12, 1990, I submitted such a proposed order, with copies to defendants' attorneys.

i. On July 18, 1990 Judge Wright issued an Order transferring the action to Judge Bartlett.

j. I did not know at that time that the reorganization/bankruptcy matter had also been transferred to Judge Bartlett, and that he also was the Judge in the very case which resulted in my abuse of process action, No. 73-CV-99-W-4. This meant that he would be the Judge in my abuse of process action against defendants Kerr and Margolin, et al., even though they were his Court appointed officials prosecuting the 1973 action against me and my wife and were acting under his authority in doing so. This

was not disclosed to me by Judge Bartlett. I learned of it as a result of Judge Bartlett, as presiding Judge in the reorganization/bankruptcy matter, being involved, together with Chief Bankruptcy Judge Frank W. Koger, in approving a settlement of my abuse of process action which I was coerced into making by reason of an unusually questionable decision by Judge Bartlett in that case. I was not advised of the above situations at any time during the proceedings in my abuse of process action before Judge Bartlett. I did not learn of them until approximately October 27, 1991 as a result of the settlement proceedings. Part of the consideration in that settlement was that I would not

continue with my appeal of that unusually questionable decision.

k. On August 1, 1990, attorneys for the defendants filed a fifteen page Motion For Summary Judgment and on August 31, 1990 a seven page (including a three page attachment) Reply Memorandum to Plaintiff's Objections. Nowhere, in all those pages, did the highly qualified attorneys, after presumedly researching all pertinent documents, and even presenting the Court with copies of some of those documents, make the claim that in June, 1980, the Court, with Judge John Oliver presiding, dismissed defendabts' 1973 action against me and my wife. Yet, after considering pleadings for almost a year - to August 28, 1991, Judge Bart-

lett issued his Order stating that the 1973 action had been dismissed on June 30, 1980 for defendants' failure to prosecute.

l. From the time I received that Order, to the present time, I have tried to get the documentation authorizing and involved in the alleged dismissal, from both the Clerk Of The Court's Office and from Judge Bartlett's Office, to no avail, in spite of numerous telephone calls and letters, including a letter to the Clerk sent Certified Mail, Return Receipt Requested, Addressee Only.

m. It is apparent from my files in the 1973 action against me and my wife that subsequent to the June 30,1980 alleged dismissal date, being on March 14,

1983, Assistant United States Attorney Judith M. Strong made her entry into the case (See copy of Docket Sheet Exhibit attached hereto); that on June 13, 1986, Trustee/Plaintiff Dale M. Thompson, upon his retirement, through his attorney, Abraham E. Margolin, petitioned Judge John Oliver, then and for many years presiding judge in the matter and very well informed about the case, to substitute the new Trustee, Whitney E. Kerr, as Plaintiff in the case, stating: "this action constitutes an asset of the Debtor" (Lake Winnebago Development Co., Inc.), and that by his Order dated June 13, 1986, Judge Oliver continued the prosecution of the case (See copy of Order attached hereto);

that on July 16, 1986, an entry was made in the docket sheet indicating a copy of Judge Oliver's Order had been sent to my wife and returned to the Court due to a wrong address (at that time, our address had been the same for approximately ten years) (see copy of docket sheet attached hereto); and that on June 15, 1989, an entry was made in the docket sheet indicating a receipt by the Court of my change of address (see copy of docket sheet attached).

o. The admitted purpose of defendants filing the 1973 action against my wife and me was to block payment to us of any monies to which we might be entitled by reason of each of us being secured creditors of the Lake Win-

nebago Development Co., Inc. Our secured creditor position resulted from my wife and me, together with my mother, Georgina G. Steinhilber, conveying a large portion of the land which served as the basis for the Lake Winnebago development to the development company for no cash monies-only a promissory note and deed of trust. Defendants have admitted that if the 1973 action was no longer in existence by reason of the alleged dismissal, then there was no longer any reason to keep from paying my wife and me our share of a so-called "dividend" which the reorganization/ bankruptcy Court awarded to all secured creditors of the development company. The "dividend" was declared by the Court on April

17, 1986, but the sixteen thousand eight hundred dollars ($16,800.00) due my wife and me under the "dividend" was never paid, in spite of the alleged dismissal of the 1973 action against us on June 30, 1980.

p. I filed an appeal from Judge Bartlett's Order alleging said dismissal to the United States Court Of Appeals For The Eighth Circuit on September 24, 1991.

q. My wife and I depend upon our social security retirement benefits for our existence, and after several conversations with counsel for defendants I agreed to accept payment of the sixteen thousand eight hundred dollars ($16,800.00) "dividend" money due in lieu of my continuing to prosprosecute my appeal.

r. Even though my wife was not a party to my action against defendants Margolin, Kerr, et al., defendants, their attorneys, and the courts involved, required her to agree to give up any rights to actions against the defendants she might have before the monies rightfully due her, as well as me, under the "dividend" were paid.

s. In an apparent attempt to justify requiring my wife to "sign on" as part of the settlement of my action when she was never a party to it, the defendants, their attorneys and the courts involved, reverted to referring to my action as being "the Steinhilber Suit", "the Steinhilber lawsuit", and "the Steinhilber Claim"; and even, I

believe, purposefully mistated the facts in the "Settlement Agreement" by stating: "In 1990, Robert V. and Johnita F. Steinhilber filed suit No. 90-0377-CV-W-4-9, in the United States District Court for the Western District of Missouri against Dale M. Thompson, former Trustee, Whitney E. Kerr, Successor Trustee, Abraham E. Margolin, F. Philip Kirwan, Norman M. Arnell, and Margolin & Kirwan, as attorneys for the debtor (Steinhilber lawsuit)." (Emphasis added) when they knew very well that the "suit" was filed by me alone and that my wife was never a party to it. The "Stipulation For Dismissal Of Appeal" prepared by defendants attorneys and presented by them to The United States

Court of Appeals For The Eighth Circuit reverts back to me alone being the Plaintiff and Plaintiff-Appellant. (See "Settlement" documents attached.)

t. I settled the case under those circumstances, and my wife and I were finally paid the monies due us under the "dividend".

u. By coincidence, in speaking with a friend who lives in the Kansas City Area, I learned that Judge Bartlett was a member of the Blackwell Sanders Matheny Weary & Lombardi law firm, attorneys for defendants Kerr, Margolin, et al, prior to his appointment as federal judge. I verified this with a seemingly embarrassed attorney handling the case for that firm. Judge Bartlett never disclosed this to

me.

v. I presently have an appeal to The United States Court Of Appeals For The Eighth Circuit appealing orders of Judge Bartlett dismissing an action for malicious prosecution and an action for abuse of process against the Lake Winnebago Home Owner's Association, Inc. and individual defendants, being No. 89-0554-CV-W-9 which I filed in said Western District.

w. As a result of my action for malicious prosecution as well as abuse of process in the Lake Winnebago Home Owner's Association case (¶ v, above), I am confident that Judge Bartlett realizes that the only reason I did not file a malicious prosecution action against defendants Margolin,

Kerr, et al. was because it is necessary that a case be ended before such an action can be entertained. I knew that case had to be dismissed someday, because it was meritless, and as finally shown by the defendants' own set-settlement documents, was filed for the purpose of blocking my wife and me from being paid monies rightfully owed us. When it was, both my wife and I could file malicious prosecution actions. The alleged dismissal in 1980 precluded that because of the statute of limitations. Thus, Judge Bartlett's Court appointed officials were protected and the settlement so provided. My rights, and those of my wife, to a very appropriate malicious prosecution action, constituted

"an asset" for each of us. (See wording in Judge Oliver's Order substituting Defendant Kerr for Defendant Thompson, attached.)

x. There is a Court appointed Receiver involved in this instant Case. In view of the facts set forth in this Affidavit regarding other Court appointed officials, I believe it is noteworthy to state that on September 7, 1988, my wife and I met with Elvin S. Douglas, Jr., of Crouch, Spangler & Douglas, and with Paul Lamoree, attorney for plaintiffs in the instant case, in Ft. Lauderdale, Florida. After a period of discussion, Mr. Lamoree became quite threatening in his efforts to have my wife and me accept a settlement of the case on his terms. He stated

that the Receiver, Mr. Jackson, worked for him, and that if we did not settle he would have him (Mr. Jackson) take away our home and automobile, among other things. He got so threatening that Mr. Douglas had to persuade him to leave the scene. I reported this to Judge Oliver, then presiding judge in the matter, to no avail. I sent copies of my letter to Judge Oliver to Mr. Lamoree and Mr. Douglas (and Mr. Jackson), so they could deny/correct my statements, and received no denials or corrections.

/s/ Robert V. Steinhilber

Subscribed and sworn to before me 3 18 92.

/s/ Linda Topping
Notary Public

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing DEFENDANT ROBERT V.

STEINHILBER'S AFFIDAVIT IN SUPPORT OF HIS MOTION FOR DISQUALIFICATION OF HONORABLE D. BROOK BARTLETT, was duly mailed U. S. Postal Service, postpaid, this 18th day of March, 1992, to: Elvin S. Douglas, Jr., Esq., P.O. Box 280, Harrisonville, MO 64701, Paul R. Lamoree, Esq., 1500 Home Savings Building, 1006 Grand Avenue, Kansas City, MO 64106, and Robert L. Jackson, Jr., Esq., 310 Ward Parkway, Kansas City, MO 64112.

/s/ ROBERT V. STEINHILBER

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| MICHAEL S. McFARLAND, et al., Plaintiffs, | ) | Civil Action |
| -vs- | ) | |
| WINNEBAGO SOUTH, INC., et al., Defendants. | ) | No. 19967-W-B-9 |

**SUPPLEMENTAL AFFIDAVIT OF DEFENDANT ROBERT V. STEINHILBER'S AFFIDAVIT IN SUPPORT OF HIS MOTION FOR DISQUALIFICATION OF HONORABLE D. BROOK BARTLETT AS PRESIDING JUDGE IN THE ABOVE-ENTITLED MATTER**

State of Florida )
) SS.
County of Broward )

I, ROBERT V. STEINHILBER, being duly sworn, say:

1. I am the Defendant Robert V. Steinhilber in the above-entitled matter.

2. Since the filing of my original Affidavit in this matter (mailed to Court

on March 18, 1992), I have reviewed the various documents filed in the related Lake Winnebago matters cases and have become aware of things which I believe are important enough to cause me to file this Supplemental Affidavit, to-wit:

a. On August 10, 1990, James Borthwick, Esq., of the law firm of Blackwell Sanders Matheny Weary & Lombardi, Judge Bartlett's old law firm (see ¶ "u" of original Affidavit), filed a Motion in the matter of Robert V. Steinhilber v. Lake Winnebago Home Ownner's Association, Inc. et al. case and the Robert V. Steinhilber v. Dale M. Thompson, et al. case stating that due to a "clerical error", by reason of having used the wrong case number, defendants in the Robert V. Steinhilber v. Dale M. Thompson,

et al., case had filed a Motion in the Robert V. Steinhilber v. Lake Winnebago Home Owner's Association, Inc., et al., case which should have been filed in the Robert V. Steinhilber v. Dale M. Thompson et al., case. (See attached Motion.)

b. It would appear from that disclosure that the law firm of Blackwell Sanders Matheny Weary & Lombardi are defense attorneys in my case against the Lake Winnebago Home Owner's Association, et al. I believe this was not disclosed to me because if I Knew I would have good reason to question the impartiality of Judge Bartlett in that case.

c. The certified docket provided by the District Court Clerk on my appeal verifies that the Black-

well, et al, law firm are defense attorney in that case. (See attached docket sheet.)

d. I do not believe there was anything illegal in the Blackwell, et al., law firm not making their appearance known when they entered my case against the Lake Winnebago Home Owner's Association, Inc. et al., but I believe a reasonable person might reasonably question whether Judge Bartlett could be a truly impartial judge in the matter, and question the circumstances of the law firm not making their participation known. And, I believe such person might reasonably ask why Judge Bartlett did not disclose his prior association with the Blackwell, et al., law firm.

e. On July 27, 1990, Judge Bart-

lett, presiding in the Lake Winnebago Development Co., Inc., reorganization/bankruptcy matter, entered an order authorizing the employment of the law firm of Hillix, Brewer, Hoffhaus, Whittaker & Wright as special counsel in the defense of Whitney E. Kerr in the Robert V. Steinhilber v. Dale M. Thompson, et al., case, effective April 20, 1990. That law firm submitted a bill for services in the amount of $13,382.09 and expenses in the amount of $52.55, presumedly to be paid out of the funds of the Lake Winnebago Development Co., Inc. (See attached Motion and supporting billing documents.) I believe a reasonable person might reasonably question the circumstances involved in some

of the items listed in that billing. For example: "05/23/90 DISCUSS DEF W/BORTHWICK"; "07/30/90 JIM BORTHWICK RE STATUS OF CASE & ORDER FROM COURT SUSTAINING PART OF SUMMARY JUDGMENT"; and "07/31/90 RE BORTHWICK CALL". (Emphasis added. The "case & order" concerned my case against the Lake Winnebago Home Owner's Association, Inc., et al., not my case against Dale M. Thompson, et al., involving the Trustee, Mr. Kerr. One might wonder why the Development Company should be charged with these items, as merely examples of questionable items in the billing, and why Judge Bartlett would approve such charges. I also believe a reasonable person might reasonably question the value of

the services of the Hillix, et al., law firm when after spending approximately 91½ hours in researching my case against Dale M. Thompson, et al., including billed items for such things as reviewing Court records, calls to undisclosed persons at the Court to learn status of "SUIT By TRUSTEE", conferences of 5 3/4 hours with Mr. Margolin, trips to the Court (again, speaking with undisclosed persons), visits to the Clerk's Offices and the Federal Records Center, etc., they did not find out that the Thompson v. Robert V. Steinhilber, et al., case had allegedly been "Dismissed for want of prosecution" on June 30, 1980.

g. In view of what has happened in the past in regard to the same

judge sitting on several Lake Winnebago matter cases, I do not believe Judge Bartlett would or could maintain impartiality toward the interested parties, the administrators and the attorneys involved. That history has been sordid and the results disgraceful. I give you for example the fact that when the bulk of the estate of the Lake Winnebago Development Co., Inc. was sold, it was sold to a party much favored by the then judge (Judge Oliver) during the almost 17 years it had moved from the initial reorganization status to the bankruptcy status as a result of the disgraceful administration by the Court appointed officials. And, it was sold at a disgrace-

fully low price. Yet, the Court appointed officials were allowed to take $900,000.00 in fees and $171,322.36 in expenses (total of $1,071,322.36) out of the $1,300,000.00 sales price.

/s/ Robert V. Steinhilber

Subscribed and sworn to before me March 23, 1992.

/s/ Barbara Haspel Galey
Notary Public

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing SUPPLEMENTAL AFFIDAVIT DEFENDANT ROBERT V. STEINHILBER S AFFIDAVIT IN SUPPORT OF HIS MOTION FOR DISQUALIFICATION OF HONORABLE D. BROOK BARTLETT, was duly mailed U.S. Postal Service, postpaid, this 23rd day of March, 1992, to: Elvin S. Douglas, Jr., Esq., P.O. Box 280, Harrisonville, MO 64701, Paul R. Lamoree, Esq., 1500 Home Savings Building, 1006 Grand Avenue, Kansas City, MO 64106, and Robert L. Jackson, Jr., Esq., 310 Ward Parkway, Kansas City, MO 64112.

/s/ ROBERT V. STEINHILBER

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| MICHAEL S. McFARLAND, et al., Plaintiffs, | ) | |
| -vs- | ) | No. 19967-CV-W-9 |
| WINNEBAGO SOUTH, INC., et al., Defendants. | ) | |

ORDER DENYING DEFENDANT ROBERT V. STEINHILBER'S MOTION FOR DISQUALIFICATION

Defendant Robert V. Steinhilber requests that I disqualify myself pursuant to 28 U.S.C. § 455(a). In support thereof defendant Steinhilber submits his Affidavit and Suggestions In Support of Motion.

Under § 455(a), "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might rea-

sonably be questioned."

After reviewing Steinhilber's Affidavit and Suggestions In Support of Motion, no reasonable person would conclude that my impartiality in this case could reasonably be questioned.

Accordingly, it is ORDERED that "Defendant Robert V. Steinhilber's Motion for Disqualification of Honorable D. Brook Bartlett as Presiding Judge in the Above-Entitled Matter and for the Assignment of Another Judge to Preside in his Stead" is denied.

/s/ D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
September 9, 1992.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

| | | |
|---|---|---|
| No. 92-3145WMKC | ) | |
| | ) | |
| In re: | ) | |
| | ) | No. 92-3145WMKC |
| Robert V. Steinhilber | ) | |
| | ) | |
| Petitioner. | ) | |

**PETITION FOR WRIT OF MANDAMUS**

COMES NOW, Petitioner, Robert V. Steinilber, and petitions the Court for a Writ Of Mandamus directed to The Honorable D. Brook Bartlett, United States District Judge, Western District of Missouri, Western Division, Respondent, directing him to disqualify himself from presiding in the matter of Michael S. McFarland, et al. v. Winnebago South, Inc., et al., No. 19967-CV-W-9, now before him, pursuant to 28 U.S.C. § 455(a), as requested in a motion by Petitioner but denied by Respondent; and in support thereof, states:

**Jurisdiction**

This petition is made pursuant to "TITLE V. EXTRAORDINARY WRITS" and Rule 21 thereunder, Federal Rules of Appellate Procedure, and Rule 25, "PETITIONS FOR WRITS OF MANDAMUS AND PROHIBITION", Eighth Circuit Appellate Procedure. It is the result of Respondent denying Petitioner's motion for disqualification of Respondent, pursuant to 28 U.S.C § 455(a).

In addition, Petitioner cites the following case law:

> Minnesota & Ontario Paper Co. v. Molyneaux (1934, **CA8 Minn**) 70 F2d 545, a receivership case, wherein the court stated that the appellate court has jurisdiction in every application for a writ of mandamus, even where there is a remedy by writ of appeal or error, to determine whether the case is rare and exceptional or whether the record discloses any special

circumstances justifying a departure from the regular course of judicial procedure.

Occidental Petroleum Corp. v. Chandler (1962, CA10 Okla) 303 F2d 55, cert den 372 US 915, a bankruptcy case, wherein the court stated that mandamus was the proper remedy for the review of the order of the trial judge in a bankruptcy proceeding denying a motion of disqualification based on the judge's bias and prejudice against movant, and the court not only had the power, but the inescapable duty to act, regardless of whether that power was conferred under the All-Writs Statute or under the inherent powers of an United States Court of Appeals to effectuate the manifest ends of justice.

Pfizer, Inc. v. Lord (1972 CA8 Minn) 456 F2d 532, cert den 429 U.S. 885, a civil anti-trust case, wherein the court cited Minnesota & Ontario Paper Co. v. Molyneaux, supra, among other cases in other circuits, and stated a substantial body of law supports the proposition that mandamus to a United States Court of Appeals will lie when a district judge has rejected affidavits seeking his recusal as legally insufficient.

Scarrella v. Midwest Federal Savings and Loan (1976 CA 8 Minn) 536 F2d 1207, cert den 429 U.S. 885, a case involving a mortgagor-mortgagee relationship, wherein the court cited Pfizer, v. Lord, supra, and stated that a determination by a district judge not to

disqualify himself is reviewable by a petition for a writ of mandamus.

Liddell v. Board of Education (1982, CA8 Mo) 677 F2d626, cert den 459 US 877, wherein the court cited Scarrella v. Midwest Federal Savings and Loan, supra, and Pfizer, Inc. v. Lord, supra, and again stated that a determination by a district judge not to disqualify himself is properly reviewable by a petition for a writ of mandamus.

Re Cement Antitrust Litigation (1982, CA9 Ariz) 673 F2d 1020, 1982-1 CCH Trade Cases P 64515, 64 ALR Fed 415, affd (US) 75 L Ed 2d 425, 103 S.Ct. 1172, wherein the court stated if a party is dissatisfied with district judge's recusal decision and confident

> that litigation will be greatly disrupted, that party may seek writ of mandamus from the court of appeals; and, that it is for just such exceptional circumstances that a writ of mandamus was designed.

**Petitioner believes his case is "rare and exceptional"**, beginning with the fact that the court has allowed counsel for plaintiffs therein to do nothing which could be considered further prosecution of their case for the last eleven (11) years of the almost twenty-one (21) years since their case was filed - their only efforts since June 30, 1981 being to try to force a settlement without the jury trial they asked for in their Complaint.

Petitioner also believes his case involves **"special circumstances"**, that **"litgation will be greatly disrupted"**, and

that the **"manifest ends of justice"** require this Court's consideration of his Petition.

**(Pages 5 through 18 of this reprint are omitted because they recite a statement of the case similar to that set forth in the "Statement Of The Case" section of this Petition, though in greater detail.)**

(Continuing with reprint.)

## Issues Presented

Petitioner could adopt the issue framed by Respondent in his Order denying Petitioner's Motion For Disqualification, i.e.: whether, after reviewing Petitioner's Affidavit and Suggestions In Support of (Petitioner's) Motion, a reasonable person would conclude that his (Respondent's) impartiality in this case could reasonably be questioned.

But Petitioner suggests the real issue is more basic than that, namely, whether

or not a party in a lawsuit is entitled to the appearance of impartiality on a subjective basis instead of on the objective basis of the judge involved.

## Argument

Petitioner believes the old cliche: "The record speaks for itself." is especially appropriate in this case, and that a careful review of it will cause the Court to appreciate his reasons for submitting this petition. Petitioner asks the Court to also carefully review Exhibits 5, 6, 7, 8 & 9 for legal authority and arguments.

In suggesting what he believes is the basic issue involved, Petitioner's belief in our system of justice causes him to further believe that the goal of our system of justice, albeit an unachievable goal, is to have every party to every lawsuit believe he or she has received a

fair and impartial hearing and and final adjudication. Keeping this goal in mind would seem to be of special importance during current times - when the public appears to have a substantial cynicism regarding our legal system, judges, and attorneys.

And, Petitioner suggests the words "**might** conclude" are more consistent with the new spirit of trying to avoid **even the appearance of impartiality** than the words "**would** conclude". In this regard, Petitioner further suggests that the very fact Respondent seems so intent on keeping jurisdiction of the subject case **might** cause a reasonable person, let alone a party, to fear a lack of impartiality. Surely no significant harm would be done by having another judge assigned to Petitioner's case, inasmuch as Respondent has only presided in the case for approximately the last five percent (5%) of the al-

most twenty-one (21) years time involved; and inasmuch as no actions have been taken during that approximate five percent (5%) of the time which could not be easily accommodated.

Petitioner realizes that this Court may not feel any one situation it reviews is sufficient to warrant issuing a writ of mandamus as he has requested, but he believes that the accummulation of circumstances is surely such that his request should be granted. For example, Petitioner realizes that Respondent's prior law firm association in another Winnebago case is not sufficient to cause him to be disqualified. But, inasmuch as Petitioner has been told by a member of the subject law firm that Respondent used to offer to recuse himself in cases in which they were involved if a party desired it, and he did not know why he did not in the subject case, Petitioner is moved to ques-

tion the fact that Respondent did not sua sponte reveal his prior association to him in his case, and offer to recuse himself. The subsequent order in regard to the JS-6 Card dismissal in that case, and the ignoring of such a dismissal in the immediate case causes Petitioner to wonder further. Likewise, e.g., Respondent's ignoring of the July 16, 1973 court pronouncements, the failure of the Receiver to do as the court suggested in regard to the subject note and deed of trust, the failure of Plaintiffs' Counsel to prosecute their case for more than eighteen (18) years, and **the fact that it was Respondent, not Plaintiffs' Counsel or the Receiver (who Counsel for Plaintiffs, Mr. Lamoree, refers to as his "employee"), who more-or-less "picked up the ball" for Plaintiffs and the Receiver, and initiated an easier way for the note and deed of trust of Petitioner's wife to be canceled,**

causes Petitioner to wonder still further. Petitioner suggests that after almost twenty (20) years from the date of filing, after more than eighteen years since Plaintiffs' Counsel had made any efforts to have the case tried before a jury as they asked be done in their Complaint, and after more than eight (8) years since the JS-6 Card dismissal, if Respondent was going to ignore the dismissal, it still would have been more appropriate for him to have issued a show cause order requiring Plaintiffs to show cause why the case should not be considered dismissed. This, especially, inasmuch as no competent evidence had ever been presented to the court to substantiate a single one of the wrongdoings the Plaintiffs accused Petitioner and his wife of committing.

Petitioner believes the truth of the matter is Plaintiffs' Counsel could not try their case before a jury because it

had no merit, and they could not get Petitioner and his wife to give up their rights even in the face of considerable threats, so the best way out of their dilemma was for Respondent to bring about the resolution of the case by judicial fiat instead of proper adjudication. Petitioner believes improper ex parte communications took place between Respondent, the Receiver, and varous counsel. Judge Hunter proposed the proper court proceedings in his July 16, 1973 pronouncements, not expropriation via the exercise of judicial discretion and manipulation. Is it any wonder Petitioner is strong in his beliefs he will not get impartial treatment from Respondent?

Petitioner believes it possible that when Respondent was assigned the subject case upon the death of Judge Oliver, either he was advised to "get rid of these Winnebago cases", or he was intent on his

own accord to do so, regardless of the unfortunate facts therein. Petitioner has always been desirous of prompt adjudication of all of the Winnebago cases since he and his wife and son became the victims of the irresponsible actions of greedy, unethical attorneys approximately twenty-two (22) years ago, after he voluntarily petitioned the federal courts for reorganization in order to resolve problems not of his doing and beyond his control. Petitioner, his wife, and his son, have had a substantial part of their lives seriously disturbed for all of those years. But Petitioner's principles will not allow him to have the adjudication of the cases controlled by greed on the part of various attorneys and expediency on the part of the judiciary without strenuous resistence no matter how long it takes. **Petitioner truly believes it will take longer, considering**

appeals which he will by principle be obligated to make, for Respondent to proceed as he seems intent upon doing, than to have a new judge give the case a fresh look and sit down with all parties to try to either settle the matters or proceed as expeditiously as is consistent with due process of law and simple justice.

Petitioner and his wife are faced with the very real possibility Respondent will issue orders, including the cancelling of the subject note and deed of trust, which will do irreparable harm to them. Petitioner's only recourse to avert such irreparable harm is to petition this Court for a Writ Of Mandamus, as he is doing.

Petitioner suggests that if Respondent desires to maintain his own integrity and that of the federal judiciary, the best way to do that is to do as many other judges have done, that is, pronounce his

impartiality and that he holds Petitioner's Motion and Suggestions to be insufficient, and nobly step aside so as to alleviate all suspicions. Petitioner and the public deserve such noble acts by their judicial officers.

**Conclusion/Relief Sought**

If Petitioner were face to face with the Members of this Appellate Court Panel, he could look each Member in the eye and ask them: "How much do you really care for justice - for the integrity of our judicial system?". And then ask them, as I do now, to issue a Writ Of Mandamus directing Respondent be disqualfied from further presiding in the subject case, and directing the assignment of a new fair and impartial judge to preside in his stead.

Respectfully submitted,

/s/ ROBERT V. STEINHILBER
Pro Se

9209 N.W. 9th Place
Plantation, FL 33324
305/475-0430

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition For Writ Of Mandamus and Exhibits was sent to the Respondent, The Honorable D. Brook Bartlett, United States District Judge, Western District of Missouri, Western Division, United States Postal Service, Priority Mail, postpaid, CERTIFIED MAIL, RETURN RECEIPT REQUESTED, United States Courthouse, 811 Grand Avenue, Kansas City, MO 64106, this 21st day of September, 1992 (see Postal Service Form 3800*); and that a true copy of said Petition minus exhibit documents, which each recipient had been previously sent or already had, was sent to: Robert L. Jackson, Jr., Esq., 310 Ward Parkway, Kansas City, MO 64112, Paul R. Lamoree, Esq., 1010 Grand Avenue, Kansas City, MO 64106, and Elvin S. Douglas, Jr., Esq., P. O. Box 280, Harrisonville, MO 64701, being the Receiver of Winnebago South, Inc., and counsel for parties, respectively, was likewise sent United States Postal Service, first class mail, postpaid, this 21st day of September, 1992.

/s/ ROBERT V. STEINHILBER

*("Receipt For Certified Mail" # P 288 780 594, Form 3800, attached.)

**United States COURT of Appeals**

**FOR THE EIGHTH CIRCUIT**

No. 92-3145WMKC

| | | |
|---|---|---|
| In re: | * | |
| | * | Petition for |
| Robert V. Steinhilber | * | Writ of |
| | * | Mandamus |
| Petitioner. | * | |
| | * | |
| | * | |
| | * | |

**JUDGMENT**

Petition for writ of mandamus has been considered by the court and is denied.

October 1, 1992

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

| | | |
|---|---|---|
| No. 92-3145WMKC | ) | |
| | ) | |
| In re: | ) | Petition for Writ of Mandamus |
| | ) | |
| Robert V. Steinhilber | ) | |
| | ) | |
| Petitioner. | ) | |

**PETITION FOR REHEARING BY PANEL**

COMES NOW, Petitioner, Robert V. Steinilber, and petitions the Court for Rehearing By Panel of his Petition for a Writ Of Mandamus directed to The Honorable D. Brook Bartlett, United States District Judge, Western District of Missouri, Western Division, Respondent, directing him to disqualify himself from presiding in the matter of Michael S. Mc-Farland, et al. v. Winnebago South, Inc., et al., No. 19967-CV-W-9, now before him, pursuant to 28 U.S.C. § 455(a), as requested in a motion by Petitioner but denied by Respondent; and in support thereof, states:

1. Petitioner believes his cause is of exceptional importance, not only to him, but to other litigants who are entitled to believe they will get a fair and impartial adjudication of their causes - who want to believe in the integrity of our judicial system.

2. Petitioner believes that in view of the changes in the approach federal courts are obligated to take under United States Supreme Court guidelines, i.e., the change from a subjective test at the almost complete discretion of a federal judge to an objective test which gives substantial consideration to the appearance of impartiality of a judge, this Court has not made a proper ruling in his case.

3. Petitioner's research into the subject matter indicates there are material differences in the interpretation and application of the United States Su-

preme Court's guidelines among the various federal courts and federal court judges; and that in the interests of the public's belief in the integrity of our judicial system, the United States Supreme Court needs to address the disparities and apparent confusion that exists. This would appear to be especially important at the present time, inasmuch as the public's belief in its various government institutions seems to be "weak", to say the least.

4. Petitioner believes it is incumbent upon him to exhaust his remedies with this Court prior to considering taking his cause and the cause of those others who want to believe in the integrity of our judicial system to the United States Supreme Court.

THEREFORE, Petitioner asks this Court to reconsider its denial of his Petition For A Writ Of Mandamus, and submits the

following suggestions in support thereof:

1. Petitioner asks the Court to review his Petition For A Writ Of Mandamus and its Exhibits in their entirety. However, realizing the limited amount of time the Court has to spend on an increasing workload, **Petitioner asks the Court to especially review the matter of Judge Bartlett's "inconsistency" in his treatment of the JS-6 Card dismissals.** (See last sentence on page 8 through first paragraph of page 10, Petition For Writ.)

2. Petitioner believes, **at the least,** he is entitled to an explanation of why Judge Bartlett could and did consider the JS-6 Card dismissal of the case where Petitioner's cause against the court appointed trustee and attorneys was terminated by the dismissal **to be a valid dismissal, whereas,** he did not consider the JS-6 Card dismissal in the current case before him **to be a valid dismissal,** when

to do so would terminate plaintiffs' case against Petitioner.

Respectfully submitted,

/s/ ROBERT V. STEINHILBER
Pro Se
9209 N.W. 9th Place
Plantation, FL 33324
305/475-0430

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "DEFENDANT ROBERT V. STEINHILBER S MOTION FOR DISQUALIFICATION OF HONORABLE D. BROOK BARTLETT AS PRESIDING JUDGE IN THE ABOVE-ENTITLED MATTER AND FOR THE ASSIGNMENT OF ANOTHER JUDGE TO PRESIDE IN HIS STEAD" was duly mailed U. S. Postal Service, postpaid, this 12th day of October, 1992, to: Elvin S. Douglas, Jr., Esq., P.O. Box 280, Harrisonville, MO 64701, Paul R. Lamoree, Esq., 1500 Home Savings Building, 1006 Grand Avenue, Kansas City, MO 64106, and Robert L.,Jackson, Jr., Esq., 310 Ward Parkway, Kansas City, MO 64112.

/s/ ROBERT V. STEINHILBER

**United States COURT of Appeals**

**FOR THE EIGHTH CIRCUIT**

No. 92-3145WMKC

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|---|---|---|
| In re: | * | |
| | * | Petition for |
| Robert V. Steinhilber | * | Writ of |
| | * | Mandamus |
| Petitioner. | * | |
| | * | |
| | * | |
| | * | |

The petition for rehearing has been considered by the court and is hereby denied.

November 9, 1992

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit.

**MANDAMUS AS REMEDY TO COMPEL DISQUALIFICATION OF FEDERAL JUDGE**

by

James O. Pearson, Jr., J.D.

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## § 1. Introduction

### [a] Scope

This annotation[1] collects and analyzes the federal cases in which the courts have considered whether, after a federal judge has denied a motion for his disqualification, mandamus is available to the losing party to compel disqualification and, if so, the circumstances in which it is available[2].

Cases which merely involve a petition for mandamus to compel disqualification

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1. The present annotation supersedes §4 [b] of the annotation at 45 ALR2d 937.

2. The present annotation is not concern- with the resolution of the question whether the judge was qualified to act in a particular case. For coverage of this subject, see 46 Am Jur 2d, Judges §§ 86 et seq., and the annotation at 40 ALR Fed 954.

of a federal judge, but which contain no discussion of the availability of the remedy or of the circumstances justifying or precluding its use, are beyond the scope of the present annotation.

**[b] Related matters**

Construction and application of 28 USC § 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy and any proceeding in which his impartiality might reasonably be questioned. 40 ALR Fed 954.

Propriety of issuing writ of mandamus in federal criminal proceedings. 929 ALR Fed 218.

Timeliness of affidavit of disqualification of trial judge under 28 USCS § 144, 24 ALR Fed 290.

Form and requirements of certificate and affidavit of disqualification of trial judge under 28 USCS § 144. 23 ALR Fed 637.

Construction and application of 28 US-

CS § 1361 conferring on Federal District Courts original jurisdiction of actions in nature of mandamus to compel federal officer, employee, or agency to perform duty owed plaintiff. 13 ALR Fed 145.

Disqualification of federal judge, under 28 USCS § 144, for acts and conduct occurring in court room during trial or in ruling upon issues or questions involved. 2 ALR Fed 917.

Mandamus as appropriate remedy to control action of federal court in civil case. 57 L Ed 2d 1203.

Power of court to remove or suspend judge. 53 ALR3d 882.

Prohibition as appropriate remedy to prevent allegedly disqualified judge from proceeding with case. 92 ALR2d 306.

Time for asserting disqualification. 73 ALR2d 1238.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or

to certify his disqualification. 45 ALR2d 930.

**2. Summary**

Where a party has filed an affidavit seeking the disqualification of a federal judge, such affidavit usually alleging bias or prejudice under 28 USCS § 144 (hereinafter referred to as § 144) or one of the grounds specified in 28 USCS §455 (hereinafter referred to as § 455), and the judge has then refused to disqualify himself, the question has arisen whether the party may at that time file a petition for mandamus seeking to compel disqualification or whether he must wait until appeal for resolution of this issue. In most of the Circuits, the courts have held that, in the presence of special circumstances, mandamus is available to compel the disqualification of a federal judge (§ 3, infra). Some courts nave upheld the availability of the remedy in this situation without specifically men-

tioning special circumstances (§ 3, infra) although the need for such can be implied from the generally accepted definition of mandamus as an extraordinary remedy[3].

In the Third (§ 4, infra), Sixth (§ 5, infra), and Seventh (§ 6 infra) Circuits, some courts, in holding that mandamus could not be used to compel a federal judge to disqualify himself, have used language indicating that mandamus would never be available in this situation. For example, some courts, applying the rule that mandamus is only available to compel a judge to perform a ministerial act, have pointed out that a judge exercises discretion in ruling on an affidavit for disqualification (§§ 4-6, infra). Other courts have reasoned that appeal affords an adequate remedy to determine the qualifications of a federal judge (§§ 4-6,

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3. See 52 Am Jur 2d,Mandamus § 5.

infra). However, since some of these same decisions contain other language regarding the availability of mandamus in extraordinary circumstances, it is not certain whether the courts are recognizing that mandamus could be available in some situations to compel disqualification of a federal judge, or whether they are simply recognizing the general availability of mandamus in special circumstances, while implying that such circumstances could never exist in disqualification cases. The confusion is compounded by the fact that in each of these three Circuits there are cases in which, under the particular facts involved, the court has permitted a party to file a petition for mandamus to compel the judge to disqualify himself (§§ 4-6, infra).

Once a court has determined that mandamus is available in special circumstances to compel disqualification of a

federal judge, it must determine whether such circumstances are present in the particular case (§ 7, infra). Courts finding special circumstances have generally relied either on the basic right that each person has to be tried before an unbiased judge or on more specific facts peculiar to the case at hand (§ 7[a], infra), while the courts finding an absence of such circumstances have generally relied on the particular facts of each case. (§ 7[b]).

**§3. View that mandamus is available in special circumstances**

The following cases support the view that in the presence of special circumstances mandamus is available as a remedy to compel a federal judge to disqualify himself.

**Sup Ct**-Ex parte American Steel Barrel Co. (1913) 230 US 35, 57 L Ed 1379, 33 S Ct 1007 (recognizing rule).

**First Circuit**-Re Union Leader Corp. (1961, CA1 Mass) 292 F2d 381, cert den 368 US 927, 7 L Ed 2d 190, 82 S Ct 361.

**Second Circuit**-Re Lisman (1937, CA2 NY) 89 F2d 898; Rosen v Sugarman (1966, CA2 NY) 357 F2d 794; Re International Business Machines Corp. (1980, CA2) 618 F2d 923, 1980-1 CCH Trade Cases ¶ 63202.

**Third Circuit**-For Third Circuit cases, see § 4, infra.

**Fourth Circuit**-Re Wingert (1938, DC Md) 22 F Supp 483.

**Sixth Circuit**-For Sixth Circuit cases, see § 5, infra.

**Seventh Circuit**-See § 6, infra.

**Eighth Circuit**-Minnesota & Ontario Paper Co. v Molyneaux (1934, CA8 Minn) 70 F2d 545; Pfizer, Inc. v Lord (1972, CA8) 456 F2d 532, 1972 CCH Trade Cases ¶ 73846, cert den 406 US 976, 32 L Ed 2d 676, 92 S Ct 2411. United States v Murphy (1937, DC MO) 19 F. Supp 987.

**Ninth Circuit**-Gladstein v McLaughlin (1955, CA9) 230 F2d 762; United States v Washington (1978, CA9 Wash) 573 F2d 1121.

**Tenth Circuit**-United States v Ritter (1959, CA10) 273 F2d 30, cert den 362 US 950, 4 L Ed 2d 869, 80 S Ct 863. Occidental Pet. Corp. v Chandler (1962, CA10 Okla) 303 F2d 55, cert den 372 US 915, 9 L Ed 2d 722, 83 S Ct 718, reh den 373 US 906, 10 L Ed 2d 201, 83 S Ct 1288 and amd on other grounds 372 US 928, 9 L Ed 2d 735, 83 S Ct 871.

**Dist Col Circuit**-Dilling v United States (1944)79 App DC 47, 142 F2d 473; Hurd v Letts (1945) 80 App DC 233, 152 F2d 121.

Declaring that it had previously[4] construed too narrowly the words "in aid of jurisdiction" in the All-Writs Act[5], the

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4. See Re Josephson (1954, **CA1 Mass**) 218 F2d 174 (disapproved Re Union Leader Corp.

court, in Re Union Leader Corp. (1961, **CA1 Mass**) 292 F2d 381, cert den 368 US 927, 7 L Ed 2d 190, 82 S Ct 361, held that it had jurisdiction to hear a petition for a writ of mandamus to order a district court judge to revoke his actions striking an affidavit of bias and prejudice filed pursuant to § 144, but that such power should be resorted to only in extreme cases, such as where exceptional circumstances or the interests of justice so require.

In Minnesota & Ontario Paper Co. v Molyneaux (1934, **CA8 Minn**) 70 F2d 545, an application for a writ of mandamus based on a disqualifying affidavit filed pursuant

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(CA1 Mass) 292 F2d 381, cert den 368 US 927, 7 L Ed 2d 190, 82 S Ct 361), not within the scope of the present annotation.

5. 28 USCS § 1651(a).

to 28 USCS §25[6] against the trial judge in a receivership case, the court stated that the appellate court has jurisdiction in every application for a writ of mandamus, even where there is a remedy by writ of appeal or error, to determine whether the case is rare and exceptional or whether the record discloses any special circumstances justifying a departure from the regular course of judicial procedure. The court explained that if such special circumstances are found to exist, it may, in its discretion, issue the writ; while if such are found not to exist, the court may refuse the writ for that reason.

Rejecting the contention that a ruling on a motion for disqualification made under § 144 is reviewable only on appeal and that the All-Writs Statute[7] does not

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6. Now 28 USCS § 144.

7. 28 USCS § 1651(a).

apply, the court, in Occidental Petroleum Corp. v Chandler (1962, CA10 Okla) 303 F 2d 55, cert den 372 US 915, 9 L Ed 2d 722, 83 S Ct 718, reh den 373 US 906, 10 L Ed 2d 201, 83 S Ct 1288 and amend on other grounds 372 US 928, 9 L Ed 2d 735, 83 S Ct 871, declared that the facts alleged and proved established that this case was an exceptional one in which the preservation of the right to a fair and impartial hearing required the exercise of its jurisdiction at the present time and that, therefore, mandamus was the proper remedy for the review of the order of the trial judge in a bankruptcy proceeding denying an oil company's motion of disqualificatio based on the judge's bias and prejudice against it. The court declared that it had the power and inescapable duty to act and that it made no difference whether such power was conferred under the All-Writs Statute or under the inherent powers of an United

States Court of Appeals to effectuate the manifest ends of justice.

In the following cases the courts held, without specifying the need for the presence of special circumstances, that mandamus is an available remedy to compel a federal judge to disqualify himself.

**First Circuit**-Re United Shoe Machinery Corp. (1960, CA1 Mass) 276 F2d 77.

**Second Circuit**-Wolfson v Palmieri (1968, CA2) 394 F2d 7.

**Fourth Circuit**-Re Rodgers (1976, CA4) 537 F2d 1196.

**Ninth Circuit**-United States v Conforte (1978, DC Nev) 457 F Supp 641, affd (CA9 Nev) 624 F2d 869, cert den 449 US 1012, 66 L Ed 2d 470, 101 S Ct 568.

**Tenth Circuit**-Texaco, Inc. v Chandler (1965, CA10) 354 F2d 655, cert den 383 US 936, 15 L Ed 2d 853, 86 S Ct 1066; Bell v Chandler (1978, CA10 Okla) 569 F2d 556.

In Bell v Chandler (1978, CA10 Okla) 569 F2d 556, a petition by the Attorney General of the United States and the Director of the FBI for a writ of mandamus to compel the trial judge to disqualify himself on the grounds of bias and prejudice under § 144, the court, without further discussion, stated that there was no question but that a mandamus petition may be used to force disqualification of a district court judge.

*OBSERVATION. Although the courts in the preceding cases did not specifically state that special circumstances are required before mandamus is available to compel a federal judge to disqualify himself, it can be implied from the basic definition of mandamus as an extraordinary remedy which is available only in cases in which the usual remedies are powerless to afford

relief,[8] that, in absence of such circumstances, they would hold that the writ was unavailable. Thus, these cases are treated as consistent with those in which the courts specifically stated the need for special circumstances.

**§ 4. Third Circuit cases**

In the Third Circuit, the status of the availability of mandamus to compel a federal judge to disqualify himself is not clear. For example, in the following case in which the court held that the remedy was not available, it is not certain whether the court was announcing a general rule that mandamus would never lie in this situation, or whether it was merely holding that the special circumstances required were not present, there being language in the decision supporting

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8. See 52 Am Jur 2d, Mandamus § 5.

each conclusion.

Thus, in Green v Murphy (1958, CA3 Pa) 259 F2d 591, a petition for a writ of mandamus by a defendant in a criminal trial based on the trial judge's refusal to disqualify himself pursuant to § 144 as biased and prejudiced against the defendant, the court, in denying the petition, declared that an adjudication by the judge against whom the affidavit of bias and prejudice is filed that the affidavit's allegations are legally insufficient is not a final appealable decision. Noting that it wished to make plain the fact that a remedy was afforded the petitioner by way of appeal from a judgment of conviction, the court explained that this remedy was adequate since the appellate court could strike down a judgment of conviction if it should find that the affidavit was legally sufficient to disqualify the trial judge under the provisions

of § 144. Noting that the function of mandamus is to correct abuses of judicial power or the refusal to exercise it, the court declared that it found no circumstances in the present case which would justify issuing the writ. The court added that it was holding only that the circumstances were not such as to convince it that, in the light of its legal discretion, it should exercise its power to issue a writ of mandamus.

In the following Third Circuit case involving § 455, the court appeared to treat the preceding case as standing for the proposition that mandamus was not available in cases arising under § 144, but held that the writ was available in the present situation because of the cial facts involved.

On the basis of the peculiar facts involved, mandamus was held to be the proper remedy for review of the trial judge's

order in an airline accident case denying the plaintiffs' motion that the judge disqualify himself under § 455, in Rapp v Van Dusen (1965, CA3) 350 F2d 806. Prior to the present action, the trial judge had ordered the actions transferred to the District of Massachusetts, which order was vacated by the Court of Appeals in a mandamus proceeding. On certiorari, the Supreme Court reversed the judgment of the Court of Appeals, which then, because of new rules enunciated by the Supreme Court, remanded the case to the District Court for reconsideration of the motion to transfer. On remand, the plaintiffs moved that the trial judge disqualify himself under § 455 since, in the earlier mandamus action, he had designated the defendants' attorney as his counsel. Although noting that, in Green v Murphy (1958, CA3 Pa) 259 F2d 591, supra, it had held that mandamus would not lie

for review of the denial of a claim of personal bias and prejudice made under § 144, the court declared that it believed that mandamus was the appropriate remedy here. The court explained that the Green case was inapplicable for two reasons: first, the order in that case was one which would later be reviewable on appeal from final judgment, whereas, if the present case were transferred, there would be no final judgment in this circuit, so that any review here must be interlocutory; and second, the present case was before the court on a claim of disqualification resulting from matters which were brought into existence by order of the court itself. The court remarked that it had a duty to correct the situation and that it did so in the exercise of its supervisory authority and in aid of its appellate jurisdiction, both well recognized grounds for mandamus.

*OBSERVATION: In the Rapp case, supra, the court, in holding mandamus was available, did not appear to place any special emphasis on the fact that the case involved § 455, as opposed to § 144 which was involved in the case of Green v Murphy (1955, **CA3 Pa**) 259 F2d 591. Rather, the difference in result between the two cases was based on other factors noted in the setout of the Rapp case. However, in the Seventh Circuit case of SCA Services, Inc. v Morgan (1977, **CA7**) 557 F2d 110, 40 ALR Fed 942, infra § 6, involving the application of § 455, the court, in refusing to follow precedents denying the availability of mandamus in situations arising under § 144, reasoned that § 455 justified the different result.

**§ 5. Sixth Circuit cases**

In the following Sixth Circuit cases,

the courts recognized the availability generally of mandamus in extraordinary circumstances, but seemed to imply that such circumstances could not be present in situations involving disqualification of federal judges for bias and prejudice.

Thus, classifying the consideration by the trial judge of the sufficiency of an affidavit of bias and prejudice pursuant to § 144 as a judicial, rather than a ministerial act, the court, in Albert v United States Dist. Court (1960, **CA6 Mich**) 283 F2d 61,cert den 365 US 828, 5 L Ed 2d 706, 81 S Ct 713, apparently applied the rule that before a petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined, and peremptory. Declaring that the order entered by the trial judge refusing to disqualify himself was not re-

viewable on appeal until final judgment had been entered in the case, the court observed that mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction, and that the writ may be granted only where it is clear and undisputable that there is no other legal remedy. However, noting that in the case of Williams v Kent (1954, **CA6 Mich**) 216 F2d 342, infra, it had passed on the sufficiency of an affidavit of prejudice in a mandamus proceeding on the assumption that a writ might appropriately issue in such a case, the court remarked that in the present case it had carefully examined the affidavit of personal bias and prejudice and was of the opinion that it would not be justified in issuing a writ of mandamus.

In dismissing a city's petition for a writ of mandamus to compel the disqualification of the judge presiding over an

antitrust suit involving the city, the court, in Cleveland v Krupansky (1980, CA6 Ohio) 619 F2d 576, 1980-1 CCH Trade Cases ¶63274, 56 ALR Fed 488, held that the city's motion to disqualify pursuant to § 455 and the Fifth Amendment, which motion was based on the attitude, demeanor, rulings, and other written opinions of the judge, did not state a cause for mandamus since all of such conduct could have occurred, and undoubtedly did occur, in judicial proceedings. Noting that disqualification under § 455(a) must be predicated on extrajudicial, rather than judicial, conduct, the court pointed out that in considering the sufficiency of an affidavit of bias and prejudice, a judge performs a judicial and not a ministerial act. The court explained that before a petitioner may resort to mandamus, he must establish that he has a clear and certain right and that the duties of the

respondent are ministerial plainly defined, and peremptory, the court observing that this was not the situation in the present case where the orders and opinions involved the exercise of discretion. Finally, noting that the city's motion to disqualify had not been filed until four years and nine months after the initiation of the antitrust suit, the court remarked that the city waited a long time in order to discover that the judge was biased, and appeared to give little credence to the city's contention that the judge's lack of impartiality was not known until early in 1980, when he denied the city's motion for limited discovery and the city's requested leave to file an amended complaint.

However, in the following case the court assumed that mandamus was available to compel disqualification of a federal judge for bias and prejudice.

Thus, in Williams v Kent (1954, CA6 Mich) 216 F2d 342, the court stated that assuming that a writ of mandamus might appropriately issue in favor of a petitioner seeking the writ to compel a district judge to disqualify himself under § 144, the petitioner had failed to show bias or prejudice personal to the district judge and was thus not entitled to the writ in any event.

**§ 6. Seventh Circuit cases**

The position of the Seventh Circuit is unclear regarding the availability of mandamus as a remedy to compel disqualification of a federal judge. For example, in the following cases, the courts appeared to hold as a general rule that mandamus is unavailable to compel disqualification for bias and prejudice.

Thus, stating that the question was whether a writ of mandamus may approximately (sic) (appropriately?) issue dir-

ecting the disqualification of the respondent judge because of his personal bias and prejudice under § 144, the court, in Korer v Hoffman (1954, CA7) 212 F2d 211, 45 ALR2d 930, answered the question in the negative. Emphasizing that the petitioner had an adequate remedy to obtain redress from a reviewing court on an appeal from any final judgment which might be entered against him, the court rejected the contention that the remedy of appeal was grossly inadequate by explaining that no logical reason appeared as to why the refusal of a judge to disqualify himself fell into any different category than his refusal to dismiss a complaint for failure to state a claim on which relief could be granted, or to dismiss an indictment for failure to charge a criminal offense, insofar as concerns the ability of an aggrieved party to obtain adequate relief on appeal. In all three instances,

the court explained, a reviewing court, on appeal from a final adverse judgment, would be presented with a legal question, and a decision favorable to the aggrieved party would require a reversal. With respect to the contention that denial of the writ forced the petitioner to continue under the stigma, stress, and strain of indictment, and subject to restriction under bail, until a later day when his case might be reached and tried, the court declared that this argument should be addressed to Congress in support of legislation authorizing interlocutory appeals, but did not constitute a ground for invoking mandamus power.

In People ex rel. Tinkoff v Campbell (1954, CA7) 212 F2d 785, a petition seeking, by mandamus, both to review an order of the trial judge approving the report of the referee in a bankruptcy proceeding, and to compel the judge to disqualify him-

self for reasons of bias and prejudice, the court declared that mandamus was not an appropriate remedy to compel a district judge to disqualify himself for alleged personal bias and that appeal afforded the petitioner an adequate remedy.

However, in the following case, although the court refused to deviate from the rule that mandamus is unavailable to compel disqualification of a federal judge for bias and prejudice, it seemed to suggest that such remedy might be available in some situations.

Thus, in Action Realty Co. v Will (1970, CA7) 427 F2d 843, a petition for a writ of mandamus filed after the trial judge had denied the petitioner's motion for disqualification in accordance with § 144, the court held that mandamus was not an appropriate remedy in cases of this type. The petitioners alleged that the judge had a personal bias and prejudice

against them because they were Jewish and a personal bias in favor of the plaintiffs in the action in question because they were Negroes. The court declared that having given careful consideration to all factors involved, it was not prepared to deviate from prior decisions establishing that the writ of mandamus was not available in this type of proceeding, the court adding that it was not persuaded on the basis of the facts in the petition before it.

The court rejected, without further comment, the petitioners' contention that extraordinary circumstances existed in that the remedy of appeal after a trial would not be adequate because of the extensive and expensive litigation that would be involved before a final judgment was returned in the case below.

Moreover, in the following case the court allowed mandamus to be used to com-

pel disqualification of a federal judge, where the action was initiated under §455.

Thus, finding that the facts required mandatory disqualification of the trial judge under § 455, the court, in SCA Services, Inc. v Morgan (1977, CA7) 557 F2d 110, 40 ALR Fed 942, held that mandamus was the appropriate remedy to compel the judge to disqualify himself. Although noting that prior Seventh Circuit decisions had not made the extraordinary writ of mandamus available for review of a trial judge's ruling on a motion for disqualification for bias or prejudice under § 144, the court explained that the specificity and legislative intent of § 455 were sufficiently difference from § 144 to warrant a departure from the previous position.

## § 7. Ascertainment of special circumstances[9]

*NOTE: The cases in this section deal with the issue whether special circumstances warranting the availability of mandamus were present. This issue should be distinguished from that of whether the petition for a writ of mandamus should be granted on the merits. It is possible, for example, for a court to hold that sufficient special circumstances existed to make mandamus an available remedy to compel disqualification, but to nevertheless deny the writ because the grounds for disqualification were not sufficiently established.

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9. Only those cases in which the courts specifically discussed the nature of the alleged special circumstances are included in this section.

[a] **Present**

In the following cases the courts held that sufficient special circumstances were present to make mandamus an available remedy to compel disqualification of a federal judge.

Thus, holding that it had jurisdiction to hear a petition for a writ of mandamus to order a district court judge to revoke his actions striking an affidavit of bias and prejudice filed pursuant to § 144, but that such power should be resorted to only in extreme cases, the court, in Re Union Leader Corp. (1961, CA1 Mass) 292 F2d 381, cert den 368 US 927, 7 L Ed 2d 190, 82 S Ct 361, declared that exceptional circumstances existed in the nature of the particular claim involved. The court stated that a trial taking place before a judge alleged to be personally biased, particularly when the claim of bias had apparently become a matter of public in-

terest, might be incompatible with the proper administration of justice, that from the general standpoint of the interest of justice, the right to be tried before an unbiased judge is basic in our judicial system; and that public confidence in the courts might require that such a question be disposed of at the earliest opportunity. The court emphasized that its holding need not commit it to entertaining every rejected affidavit of prejudice since mandamus is a discretionary writ.

Where a corporation, sued by the government in an antitrust action, filed an affidavit pursuant to the Fifth Amendment and §§ 144 and 455, charging the trial judge with bias and prejudice against the corporation, and where the trial judge denied the request for recusal as both untimely and legally insufficient, the court, in Re International Business Machines Corp. (1980, CA2) 618 F2d 923, 1980-1 CCH Trade Cases ¶ 63202, held that the

remedy of mandamus was available to the corporation to compel the trial judge to recuse himself, but only if it satisfied the burden of establishing that its right was clear and indisputable. Noting that there were few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself, the court explained that a claim of personal bias and prejudice struck at the integrity of the judicial process, and that it would be intolerable to hold that the disclaimer of prejudice by the very jurist who was accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits. Noting that the government argued that the trial judge's findings of untimeliness and insufficiency were discretionary and that where a matter was committed to the discretion of the trial judge, a petitioner for a writ of mandamus could not meet the

aforementioned "clear and indisputable" right test, the court explained that the question before it was not whether the trial judge had abused his discretion, but whether he could exercise any discretion because of a personal, extrajudicial bias which precluded dispassionate judgment. The court thus concluded that mandamus was an appropriate remedy, but denied it under the facts presented.

Although denying the petition for a writ of mandamus filed by several drug manufacturers to compel the trial judge in a civil antitrust action to recuse himself for reasons of bias and prejudice under § 144, the court, in Pfizer, Inc. v Lord (1972, CA8) 456 F2d 532, 1972 CCH Trade Cases ¶ 73846, cert den 406 US 976, 32 L Ed 2d 676, 92 S Ct 2411, held that mandamus to a United States Court of Appeals will lie where a district judge has rejected, as legally insufficient, affi-

davits seeking his recusal. The court pointed out that the right to a trial before an unbiased judge is basic to our judicial system, and that public confidence in the courts may require that a question concerning a judge's qualifications be disposed of at the earliest opportunity. However, the court observed that mandamus is a discretionary writ and need not be issued in every instance. The court further observed that it was noteworthy that the United States, as a respondent in these proceedings, suggested that mandamus was an appropriate remedy given the complexity, number, and probable duration of the cases involved,and that rather than leave such a serious charge unresolved throughout this lengthy litigation, the writ might properly be used to review the trial judge's denial of the manufacturers' motion for disqualification. The court noted that the trial

judge himself had characterized this case as "practically the biggest assignment ever taken on by a judge anywhere in the history of jurisprudence of any kind."

In refusing to disqualifying himself on grounds of bias and prejudice, the trial judge, in United States v Murphy (1937, DC Mo) 19 F Supp 987, urged that the parties seeking his disqualification petition the Court of Appeals for a writ of mandamus in order to determine his qualifications prior to trial. The judge pointed out that mandamus was a proper remedy in cases of this type, even though the right of appeal existed, where there were circumstances imperatively demanding a departure from the ordinary remedy by appeal. The court explained that in the situation confronting it, involving election fraud prosecutions, affidavits of bias and prejudice had been previously filed in six cases, four of which remained to be tried

and were on the trial calendar, while the present affidavits were also filed in six cases, all of which were on the trial calendar. Thus, the judge continued, there were ten cases yet to be tried, in every one of which, if the affiants were right, the trial judge was disqualified. Furthermore, the judge said, there was reason to believe that another grand jury charged to investigate similar offenses would return other indictments of the same type, one-half of which would be assigned to the trial judge, so that instead of 10 cases, there might be as many as 30 cases in which his qualifications were an issue. The judge concluded that in the light of these facts, it was apparent that there were special circumstances justifying the remedy of mandamus, the judge remarking that that the only cases found in which it had been held that mandamus was not the proper remedy where a judge had refused to

disqualify himself were cases involving a single proceeding.

An attorney who was ordered by a federal judge to show cause why the judge should not disbar or suspend him from practice in his court and who then filed an affidavit pursuant to § 144 seeking to have the judge disqualified because of personal bias and prejudice, which affidavit was ruled insufficient by the judge, was held entitled to have the judge's ruling on the affidavit reviewed by mandamus, in Gladstein v McLaughlin (1955, CA9) 230 F2d 762. Without any hearing on the merits of the order to show cause, the judge issued an order suspending the the attorney from further practice in the Hawaiian district court except in a specific case in which the attorney was then appearing. In rejecting the judge's contention that the hearing on the order to show cause should proceed and the suffi-

ciency of the affidavit should then be considered on appeal, rather than in a mandamus proceeding, the court emphasized that there were special circumstances justifying the issuance of a writ of mandamus, namely, the irreparable injury in the deprivation of the attorney's right to practice and the likely irreparable unjust smearing of his reputation during the course of the proceeding below and the months of appellate procedure. Observing that the affidavit was clearly sufficient to disqualify the judge, the court pointed out that unless mandamus was granted it would be forced to consider a record compiled by a judge known to be prejudiced, and which could be affected with his prejudice, thereby causing unjust reflection on the attorney prejudicial to his further employment.

In United States v Ritter (1959, CA10) 273 F2d 30, cert den 362 US 950, 4 L Ed

2d 869, 80 S Ct 863, an application by the United States to set aside an order of the trial judge denying its motion that all further proceedings be heard before another judge, the court granted the relief sought, stating that there was no doubt that it had the power to do so, whether it be found in the All-Writs Statute or in the exercise of its inherent powers of appellate jurisdiction to effectuate the manifest ends of justice. When the principal case had first reached the Appellate Court, the court had observed that it had been tried in an atmosphere of maximum emotion and minimum judicial impartiality. On a second appeal of the case after retrial, limited to the issue of damages, the appellate court, in reversing the case for a new trial as to damages only, had again commented on the lack of impartiality of the trial judge and had suggested that further proceed-

ings in the case be had before another judge. However, the trial judge refused to step aside and denied the motion of the United States for a trial before another judge. The court concluded that in view of this record, the United States could not obtain a fair and impartial trial before the presently presiding judge, and the proper administration of justice required that further proceedings in the case be heard before another judge, the court thus ordering that further proceedings be heard before a judge to be determined by the Chief Judge of this circuit.

It was held in the following case that the refusal of an unqualified judge to recuse himself was itself a special circumstance justifying the issuance of a writ of mandamus to compel recusal.

Although concluding that the facts failed to establish that the trial judge

had a personal bias and prejudice against an attorney representing a party in a bankruptcy proceeding, and thus denying the attorney's petition for a writ of mandamus filed pursuant to § 144, the court, in Rosen v Sugarman (1966, CA2 NY) 357 F2d 794, rejected the contention that mandamus was never an appropriate remedy to direct a judge to recuse himself. The court pointed out that the United States Supreme Court, in a decision not within the scope of the present annotation,[10] had made it clear that the power conferred on appellate courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law pursuant

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10. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

to 28 USCS §1651(a), was not confined to actions which impeded the ultimate jurisdiction of its appellate jurisdiction. Accordingly, the court declared that it could think of few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself. The court explained that in the interest of public confidence in the courts, and to insure the proper administration of justice, it is necessary that mandamus be available to compel an unqualified judge to recuse himself. The aforementioned considerations, the court continued, far outweighed the objections to piecemeal appeals which ordinarily militate against deciding on mandamus an issue which could be reviewed after trial. Although cautioning that writs in such cases should be issued sparingly and only when the facts alleged clearly called for relief, lest mandamus to review refusals of dis-

qualification become a potent weapon for harassment and delay, the court stated that it would ill serve the proper administration of justice to deny the power of an appellate court to issue the writ in an appropriate case.

**[b] Not present**

Although recognizing the rule that in special circumstances mandamus is available to compel the disqualification of federal judges, the courts in the following cases held that such special circumstances were not present.

Although otherwise finding special circumstances justifying its jurisdiction to hear a petition for a writ of mandamus to order a district court judge to revoke his actions striking an affidavit of bias and prejudice filed pursuant to § 144, the court, in Re Union Leader Corp. (1961, **CA1 Mass**) 292 F2d 381, cert den 368 US 927, 7 L Ed 2d 190, 82 S Ct 361, rejected

the argument that because a judge against whom a sufficient affidavit of prejudice has been filed allegedly ceases to have power to act, mandamus is an appropriate remedy. Although noting that lack of jurisdiction in the district court is a classic example calling for exercise of mandamus, the court reasoned that the very fact that the judge has the power to decide whether the affidavit was sufficient made this justification for exercising jurisdiction inapplicable. Furthermore, the court rejected the argument that, absent mandamus, a lengthy trial might ensue needlessly, reasoning that this argument would apply to every interlocutory ruling which might effect the outcome of a case.

Although observing that the remedy of appeal from an order denying a motion charging the trial judge with personal

bias and prejudice and seeking his disqualification was available the court, in Re Lisman (1937, CA2 NY) 89 F2d 898, held that a writ of mandamus may issue as a substitute where special circumstances exist. Noting that it was contended that such circumstances existed in this bankruptcy proceeding because of the serious effect of the debtor's property which on the delay incident to an appeal would occasion, the court pointed out that similar circumstances had been held insufficient in the case of Minnesota & Ontario Paper Co. v Molyneaux (1934, CA8 Minn) 70 F2d 545, infra, which dealt with an equity receivership involving large properties. The court added that even assuming that facts existed justifying issuance of the writ, the disqualifying facts alleged in the affidavit were clearly insufficient.

In Minnesota & Ontario Paper Co. v Molyneaux (1934, CA8) 70 F2d 545, an ap-

plication for a writ of mandamus based on a disqualifying affidavit filed against the trial judge in a receivership case, which affidavit was held to be insufficient by the judge, the court stated that the appellate court has jurisdiction in every application for a writ, even where there is a remedy by writ of error or appeal, to determine whether the case is rare and exceptional or whether the record discloses any special circumstances justifying a departure from the regular course of judicial procedure. The court explained that if such special circumstances are found to exist, it may, in its discretion, issue the writ, while if such are found not to exist, the court may refuse the writ for that reason. Applying this standard, the court stated that because this proceeding involved a jurisdictional challenge in a receivership case which involved large properties

and in which a number of important administrative and other orders would normally be made, it would have ordinarily concluded that exceptional circumstances justifying the issue of the writ existed. However, the court declared that it was bound by the decision of the Supreme Court, in Ex parte American Steel Barrel Co. (1913) 230 US 35, 57 L Ed 1379, 33 S St 1007,in which the Supreme Court held that a writ of mandamus should not issue, even though the disqualifying affidavit was filed in the midst of a bankruptcy proceeding involving considerable properties.

*OBSERVATION: Although the court, in the Molyneaux case set out above, in relying on the case of Ex parte American Steel Barrel Co. (1913) 230 US 35, 57 L Ed 1379, 33 S Ct 1007, declared that the situation in that case was so closely analogous to the one before it

that it was unable to distinguish it, it should be noted that the American Steel Barrel case involved a petition for a writ of mandamus to compel the trial judge to resume jurisdiction after he had disqualified himself on the basis of an affidavit alleging bias and prejudice and had been replaced by another judge. In the course of holding that mandamus was not appropriate in this situation, the Supreme Court observed that had the trial judge refused to disqualify himself, his action might have been excepted and assigned as error when the case finally came under review of an appellate tribunal, the Court observing that mandamus will be granted only when it is clear and indisputable that there is no other legal remedy.

In United States v Washington (1978, CA9 Wash) 573 F2d 1121, an appeal by the

state from a denial of its motion to disqualify the trial judge from any further proceedings in a case in which it was involved, the court after holding that the ruling in question was not an appealable order, observed that in an exceptional case, where the issue of disqualification appeared to be a significant one, the court could consider the motion to disqualify upon a petition for writ of mandamus. Noting that although it might, where circumstances warrant, treat an attempt to appeal from a nonappealable order as a petition for a writ of mandamus, the court refused to do so in this case since it had considered similar contentions by the state when it had denied a petition for a writ of mandamus in a previous order. With respect to the state's claim that additional issues were no involved, the court pointed out that those issues could have been raised in the prev-

ious mandamus proceeding.

Stating that even assuming that it had the power to issue a writ of mandamus to the trial judge to disqualify himself as a result of affidavits of bias and prejudice filed against him pursuant to 28 USCS § 25,[11] the court, in Dilling v United States (1944) 79 **App DC** 47, 142 F2d 473, denied the petition since if the trial judge had erred in rejecting the affidavits, such error could be corrected on appeal. Stating that it ought not to exercise the power to issue writs of mandamus except in rare and extraordinary cases, the court declared that the circumstances of the present case, especially considering that the trial was now in progress, were not such as to warrant the issuance of the writ.

In Hurd v Letts (1945) 80 **App DC** 233,

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11. Now § 28 USCS § 144.

152 F2d 121, a motion for leave to file a petition to obtain an order requiring the trial judge to recuse himself because of personal prejudice under 28 USCS § 25,[12] the court, in denying the petition, applied the rule that unless there were special circumstances requiring the issuance of the writ, it would not ordinarily issue where the remedy of appeal existed. Noting that the affidavit alleging the judge's bias and interest was not filed until the fifth day of trial, the court stated that although the rule that the affidavit must be filed in advance of the

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12. This section has now been replaced by § 144.

Although the above case did not specify that it involved a writ of mandamus, it appears that it did from the description of the purpose of the petition.

trial was not applicable here since the facts were then unknown to the petitioner, there was every reason of convenience in the conduct of the business of the court that the question now should be reserved for appeal if counsel were so minded.

In General Tire & Rubber Co. v Watkins (1964, **CA4 Md**) 331 F2d 192, 141 USPQ 264, cert den 377 US 952, 12 L Ed 2d 498, 84 S Ct 1629, 141 USPQ 950, a mandamus proceeding to compel the trial judge to grant a demand and motion for a jury trial, in which the petitioner alleged, inter alia, that the trial judge's failure to disqualify himself after the filing of an affidavit of prejudice was a circumstance warranting a trial by jury, and the court declined to consider the sufficiency of the affidavit of prejudice, observing that the petitioner's argument had no place in a proceeding which sought review of the trial judge's decision on the denial of a

jury trial, not on the sufficiency of the affidavit of prejudice. Noting that the order of the trial judge refusing to disqualify himself was now appealable as a final order, the court remarked that it was confronted with an almost insurmountable burden of work and that it would be inadvisable to disrupt its already enormously heavy schedule to hand down purely advisory opinions.

**Consult POCKET PART in this volume**

**for later cases and statutory changes**

Later Case Service **56 ALR Fed 494-509**

**§ 1. Introduction**

**[b] Related Matter**

Constitutional issues relating to federal criminal prosecution of federal judge, 65 ALR Fed 819.

Substitution of judges under Rule 25 of Federal Rules of Criminal Procedure, 73 ALR Fed 833.

Disqualification of federal judge un-

der 28 USCS § 455(b)(5)(ii) on ground that judge's relative is acting as lawyer in proceeding. 73 ALR Fed 879.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case. 16 ALR4th 550.

Waiver or loss of right to disqualify judge by participation in proceedings---- modern state civil cases. 24 ALR 4th 870.

Waiver or loss of right to disqualify judge by participation in proceedings---- modern state criminal cases. 27 ALR4th 597.

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant. 72 ALR4th 651.

Judge's previous legal association with attorney connected to current case as warranting disqualification. 85 ALR4th

700.

Auto-Cite: Cases and annotations referred to herein can be further researched through the Auto-Cite computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

**§ 3. View that mandamus is available in special circumstances**

Issue of judicial disqualification presents extraordinary situation suitable for exercise of mandamus jurisdiction of Court of Appeals. Re United States (1981, CA1) 666 F2d 690.

District judge's determination not to disqualify himself is reviewable by appeal only from final judgment in cause which motion for disqualification was filed; however, such determination is also reviewable by petition for writ of mandamus. Liddel v Board of Education (1982,

CA8 Mo) 677 F2d 626, cert den 459 US 877, 74 L Ed 2d 142, 103 S Ct 172, later proceeding (ED Mo) 567 F supp 1037, stay den (CA8 Mo) 717 F2d 1180, later proceeding (CA8 Mo) 731 F2d 1294,76 ALR Fed 435, cert den 469 US 816, 83 L Ed 2d 30, 105 S Ct 82 and clarified (CA8 Mo) 758 F2d 290, later proceeding (CA8 Mo) 830 F2d 823, later proceeding (CA8 Mo) 839 F2d 400, later proceeding (ED Mo) 686 F Supp 235, affd, remanded (CA8 Mo) 851 F2d 1104, on remand (ED Mo) 696 F Supp 444, affd, remanded (CA8) 907 F2d 823 and affd in part and revd in part on other gnds (CA8 Mo) 873 F2d 191, petition den (CA8) 1989 US App LEXIS 8014, op withdrawn, op replaced, clarified (CA8 MO) 882 F2d 298, later proceeding (ED Mo) 733 F supp 1324 later proceeding (ED Mo) 758 F Supp 499, affd (CA-8) 1991 US App LEXIS 12040 and cert den 488 US 825, 102 L Ed 2d 50, 109 S Ct 74, later proceeding (CA8 Mo) 867 F2d 1153,

and affd in part and revd in part on other gnds (CA8 Mo) 801 F2d 278, reh den (CA8 Mo) 804 F2d 500, later proceeding (ED Mo) 654 F Supp 334, later proceeding (ED Mo) 654 F Supp 345, remanded (CA8 Mo) 822 F2d 1446, later proceeding (CA8 Mo) 823 F2d 1252, (ED Mo), later proceeding (Ed Mo) 674 F Supp 687.

If dissatisfied with district judge's recusal decision and confident that litigation will be greatly disrupted, party may seek writ of mandamus from court of appeals; it is for just such exceptional circumstances that writ was designed. Re Cement Antitrust Litigation (1982, **CA9 Ariz**) 673 F2d 1020, 1982-1 CCH Trade Cases P 64515, 64 ALR Fed 415, affd (US) 75 L Ed 2d 425, 103 S Ct 1172.

**§ 4. Third Circuit cases**

Mandamus is proper remedy to vacate orders of judge who acted when he should have recused. Moody v Simmons (1988, **CA3**)

858 F2d 137, cert den (US) 103 L Ed 2d 835, 109 S Ct 1529.

**§ 6. Seventh Circuit cases**

Mandamus was proper remedy to compel recusal of judge who refused to do so himself when required to by statutory standard expressed in Jud. Code § 455(a) that requires recusal in proceedings in which judge's impartiality might reasonably be questioned, where headhunter working on behalf of judge, who was exploring possibility of retiring from bench and returning to practice, mistakenly contacted firms representing parties in antitrust action pending before judge regarding possible future employment of judge, and where judge denied formal motion by defendants for recusal. Pepsico, Inc. v McMillen (1985, **CA7**) **764** F2d 458, 1985-2 CCH Trade Cases P 66661.

Writ of mandamus is vehicle by which appellate court may exercise supervisory

powers over District Courts with respect to recusal to avoid appearance of partiality, and when judge denies motion to disqualify himself under 28 USCS § 455(a), moving party's sole recourse is to apply to court immediately for writ of mandamus; appellate court will not review denial of motions to disqualify under § 455(a) since such error would do injury only to judicial system, and not to substantial rights of parties, United States v Balistrieri (1985, **CA7 Wis**) 779 F2d 1191, later proceeding (CA7 Wis) 778 F2d 1226, cert den (US) 91 L Ed 2d 573, 106 S Ct 3284 and (disagreed with by multiple cases as stated in Union Carbide Corp v U.S. Service, Inc. (**CA7 Ill**) 782 F2d 710,1986-1 CCH Trade Cases P 66940, 4 FR Serv 3d 151) and cert den (US) 89 L Ed 2d 892, 106 S Ct 1490.

Where trial judge denies motion to disqualify himself under 28 USCS § 455, comp-

rehensive federal recusal statute, moving party's sole recourse is to immediately apply to Court of Appeals for writ of mandamus. United States v Balistrieri (1985, CA7 Wis) 779 F2d 1191, later proceeding United States v Balistrieri (1985,CA7 Wis) 778 F2d 1226, Cert den Balistrieri v. United States (1986, US) 91 L Ed 2d 573, 106 S Ct 3284 and (disagreed with by multiple cases as stated in Union Carbide v U.S. Cutting Service, Inc. (1986, CA7 Ill) 782 F2d 710, 1986-1 CCH Trade Cases P. 66940, 4 FR Serv. 3d 151) and cert den Di Dalvo v United States (1986, US) 89 L Ed 2d 892, 106 S Ct 1490.

Although Court of Appeals has been liberal in allowing use of extraordinary writ of mandamus to review orders denying motions to disqualify, mandamus will of course be denied in frivolous and even routine cases in which party challenges judge's refusal to recuse himself, and sanctions are appropriate if petition for

mandamus is frivolous. Union Carbide Corp. v U.S. Cutting Service, Inc. (1986, **CA7 Ill**) 782 F2d 710, 1986-1 CCH Trade Cases ¶66940.

"[M]andamus is the only method of correcting a judge's refusal to recuse himself under 28 USCS § 455(a)." Taylor v O'Grady (1989, **CA7 Ill**) 888 F2d 1189, 4 BNA IER Cas 1569.

In bankruptcy proceeding, court properly denied defendants leave to appeal resual of judge to recuse himself, where mandamus was only remedy to review denial of motion to recuse. Re Cash Currency Exchange, Inc. (1988, **ND Ill**) 85 BR 797.

**(End of Reprint)**